Office - Supreme Court,
FILED
JAN 3 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 110

ERICK RIOS BRIDOUX, *Petitioner*,

v.

EASTERN AIR LINES, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRAINARD H. WARNER III
1010 Vermont Ave., N. W.
Washington 5, D. C.
Attorney for Petitioner

Of Counsel:
B. HOWELL HILL, JR.
815-15th Street, N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	5
Conclusion	7

CITATIONS

Barron and Holtzoff, 3 Federal Practice and Procedure, Rules Edition, Section 1323, page 253 7
Bushey v. *U.S.*, 109 F. Supp. 427 6
Ellington v. *Milne*, 14 F.R.D. 241 6
Federal Rules of Civil Procedure, Rule 60 (b) 2, 4, 5, 6
Klapprott v. *U.S.*, 335 U.S. 601, 69 S. Ct. 384 6
Nelms v. *Baltimore & Ohio R. Co.*, 11 F.R.D. 441 6
Tozer v. *Charles A. Krause Milling Co.*, 189 F. 2d 242 6
U. S. v. *Backhofen*, 176 F. 2d 263 6
U. S. v. *Karahalicis*, 205 F. 2d 331 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

ERICK RIOS BRIDOUX, *Petitioner,*

v.

EASTERN AIR LINES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review that portion of the judgment of the United States Court of Appeals for the District of Columbia Circuit refusing to revive and reinstate the defendant's counterclaim, entered in the above-entitled case on February 11, 1954.

Opinions Below

The United States District Court for the District of Columbia did not render an opinion in this cause. The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth on pages 26-30 of the record.

Jurisdiction

The judgment of the Court of Appeals was entered on February 11, 1954. (R. 34) A petition for rehearing filed on February 26, 1954 (R. 35) was denied on March 5, 1954 (R. 39). The jurisdiction of this Court is invoked under 28 U. S. C., #1254 (1).

Question Presented

Whether a court can *grant* relief from a default to a defendant and *deny* relief from a default to a plaintiff in a single factual situation pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

Statute Involved

Rule 60(b) of the Federal Rules of Civil Procedure.

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *"

Statement

The petitioner, Captain Erick Rios Bridoux, is a citizen of the Republic of Bolivia and was Director General of Civil Aeronautics for Bolivia in 1949 when he came to the District of Columbia to study under the Civil Aeronautics Administration. On November 1, 1949, while serving with the Bolivian Army Purchasing Commission, the petitioner piloted a certain Bolivian P-38 aircraft near Washington National Airport. The P-38 was struck in mid-air by a DC-4 aircraft operated by the respondent, Eastern Air Lines, Inc. All of the passengers and crew carried in the Eastern plane were killed and the petitioner was the sole survivor of the collision.

Respondent filed a complaint for damages against petitioner in the United States District Court for the District of Columbia in 1949. Petitioner answered denying liability and filed a counter-claim through counsel. Petitioner, an alien, departed from the United States in July, 1950, because he was without funds (R. 10) and did not return until December, 1952.

Four months after petitioner's departure from the United States, and without his knowledge, the attorneys who represented him in the action filed a Motion for Leave to Withdraw as his attorneys (R. 6). The Motion and supporting Points and Authorities (R. 7) state that petitioner's address was unknown to them, but the certificate of service (R. 8) indicates that it was served on petitioner at an address in Washington, D. C. where the attorneys knew he had not resided for several months. The trial court, however, granted the motion and an order granting the said attorneys Leave to Withdraw was entered (R. 8).

A few weeks before the pre-trial of this case in June of 1952 notices were again mailed to petitioner's District of Columbia address that the record indicated had not been used for approximately two years, but no effort was made to contact him in Bolivia. When petitioner did not appear and was not represented at the said pre-trial, respondent moved for a default and the same was granted together with the dismissal of petitioner's counterclaim.

Petitioner returned to the District of Columbia in December of 1952 and within a few days obtained counsel who filed a Motion to set aside the defaults on January 2, 1953 (R. 9). The trial court, after argument, denied the Motion and overruled a Motion to Reconsider (R. 19).

On appeal the Court of Appeals found: (1) that petitioner never received actual notice of the withdrawal of his counsel or of any proceedings leading to the default judgment and dismissal of his counterclaim until after they had been entered (R. 27), (2) that it was not unnatural for petitioner to leave the United States (R. 29)

and (3) that it could not be said definitely that the case would be reached for trial within the time which actually expired before his return, when, through new counsel, he promptly moved that the default be set aside and the counter-claim reinstated (R. 29).

On the basis of its findings, the Court of Appeals held that the District Court abused its discretion in failing to set aside the default judgment against petitioner but that "[petitioner's] lack of diligence in respect to his counter-claim might appropriately be made to bear some of the consequences of his default." (R. 30) On that basis the Court of Appeals affirmed the dismissal of petitioner's counter-claim. A Petition for Rehearing (R. 35-38) was denied by Order of the Court of Appeals entered March 5, 1954 (R. 39).

Specification of Errors

The United States Court of Appeals for the District of Columbia Circuit erred:

1. In holding that the petitioner had a different right to relief as a defendant than he did as a plaintiff under Rule 60 (b) of F. R. C. P.

2. In failing to hold that it was an abuse of discretion for the District Court to fail to revive and reinstate the counter-claim.

3. In affirming the portion of the order of the District Court refusing to revive and reinstate the petitioner's counter-claim.

4. In affirming the District Court with respect to petitioner's counter-claim on the ground that "[Petitioner's] *lack of diligence* in respect to his counter-claim might appropriately be made to *bear some of the consequences of his default.*" (Emphasis supplied.)

Reasons For Granting The Writ

1. The question presented is of importance in the application of Rule 60 (b) of the Federal Rules of Civil Procedure. Its settlement by this Court is plainly in the Public Interest, since Rule 60 (b) has been the subject of extensive and continuing litigation, much of which will be in doubt until this question is resolved.

2. The Court of Appeals has given a novel and important interpretation to Rule 60 (b) on the basis of inadequate reasoning. The Court of Appeals found that it *was* an abuse of discretion to refuse to set aside the default judgment in the factual circumstances of the present case, but that it *was not* an abuse of discretion to refuse to reinstate the counter-claim.

The only basis for the court's distinction is the following sentence:

> "[Petitioner's] lack of diligence in respect to his counterclaim might appropriately be made to bear some of the consequences of his default."

Clearly, *lack of diligence bearing consequences of default* is not an adequate basis upon which to determine that Rule 60 (b) should be more harshly construed with respect to counter-claimants or plaintiffs than with respect to defendants. If such a distinction does exist, this Court should clarify that fact for all courts and all litigants. If it does not, the decision below of the United States Court of Appeals for the District of Columbia Circuit should not be permitted to stand as a precedent on this important question.

3. The decision of the Court of Appeals has the effect of holding that a plaintiff is less entitled to his "day in court" than is a defendant. It thereby creates a distinction which is novel with respect to all decided cases under Rule 60 (b) which the petitioner has, with due diligence, been able to discover.

Rule 60 (b), by its terms, is made applicable to any "final judgment, order, or proceeding." The courts have not questioned its applicability to the setting aside of default judgments (specifically covered by Rule 55 (b)) or dismissals.

Tozer v. *Charles A. Krause Milling Co.*, 189 F. 2d 242 (C.A. 3) 1951.
Bushey v. *U. S.*, 109 F. Supp. 427 (U.S. Ct. Cl.) 1953.[1]
Nelms v. *Baltimore & Ohio R. Co.*, 11 F. R. D. 441 (D.C. E.D. Ohio) 1951.

Nor was there any question of applicability in the decision of the Court of Appeals in the present case.

Rule 60 (b) has been frequently construed by our Courts and without exception has been given a most liberal construction.

Klapprott v. *U. S.*, 335 U.S. 601, 69 S. Ct. 384.
U. S. v. *Karahalicis*, 205 F. 2d 331 (C.A. 2)
U. S. v. *Backofen*, 176 F. 2d 263 (C.A. 3)
Ellington v. *Milne*, 14 F. R. D. 241 (D.C., E.D. N.C.)

The reason for such liberal interpretation was set forth by the Third Circuit in *Tozer* v. *Charles A. Krause Milling Co., supra*, where the court said (189 F. 2d 242, 245):

> "The recent cases applying Rule 60(b) have uniformally held that it must be given a liberal construction. * * * Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. (citing cases) Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments. We are of the opinion that the Court below applied a standard of strictness rather than one of liberality in concluding that justice did not require that the judgment be set aside."

---

[1] Construing Rule 54(b) of the Court of Claims, which is substantially identical with Federal Rule 60(b).

This same position is taken in *Barron and Holtzoff*, 3 Federal Practice and Procedure, Rules Edition, Section 1323, page 253, which states:

> "The discretion should ordinarily incline towards granting rather than denying relief, especially if no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue."

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BRAINARD H. WARNER III
Attorney for Petitioner

June 3, 1954